# Tan Guat Lan & Anor v Aetna Universal Insurance Sdn Bhd

HIGH COURT (TEMERLOH) — CIVIL SUIT NO 22–43 OF 1998
RAMLY ALI J
8 JANUARY 2003

***Civil Procedure*** *— Jurisdiction — High Court — Amount claimed by plaintiffs was RM100,000 only — Whether suit ought to be brought in the sessions court — Whether High Court had jurisdiction to hear matter*

***Insurance*** *— Life insurance — Duty of disclosure — Claim for payment of insurance policy rejected by insurer on the ground that insured failed to disclose his real state of health — Some questions in proposal form not completed — Proposal form stipulated that certain questions need not be completed for 'medical case' — No evidence from defendant to show that this was 'non-medical case' — Whether case in proposal should be construed as 'medical case'*

***Insurance*** *— Life insurance — Formation of contract and commencement of cover — Incontestability clause in insurance policy stipulated that policy shall be incontestable after it had been in force for two years from date of issue or reinstatement of this policy, whichever was the later — Whether incontestability clause in policy affected statutory incontestability provisions under s 15C(4) of the Insurance Act 1963 — Whether insurer and insured can contract out of s 15C(4) of the Insurance Act 1963*

***Insurance*** *— Life insurance — Formation of contract and commencement of cover — Whether insurer can dispute validity of life policy — Statutory incontestability — Whether s 15C(4) of the Insurance Act 1963 was applicable — Whether the two-year period specified in s 15C(4) within which an insurer can dispute validity of life policy commenced from the time the policy was originally effected or from the time the policy was reinstated*

The plaintiffs were the administrators of the estate of one Lim Hee Hiung ('LHH'). During his lifetime, LHH entered into a contract of life insurance with the defendant. Under the terms of the life insurance, the defendant was to pay LHH's wife ('the first plaintiff'), as beneficiary, a sum of RM100,000 upon LHH's death. The said policy was first issued on 2 May 1990. After that, the policy was reinstated twice, on 8 May 1991 and 14 February 1993. LHH died on 28 August 1993. Both the plaintiffs took out letters of administration of LHH's estate and proceeded with their claim against the defendant. The defendant failed and refused to pay the RM100,000 on the ground that LHH had failed to disclose to the defendant his real state of health and had instead declared that he was healthy when he was in fact suffering from 'hypertensive/ischaemic heart disease'. The plaintiffs filed the present action for specific performance of the policy and for the defendant to pay a sum of RM100,000 together with interest to the first plaintiff as the named beneficiary in the policy and costs. The defendant filed its counterclaim for a declaration that the said policy was null and void on the ground that LHH had failed to disclose that he was suffering from 'hypertensive/ischaemic heart disease'. In addition, the defendant also prayed for a declaration that

A the sum RM2,368.21 (being premium paid by LHH for the reinstatement of the policy) was effectively refunded to the first plaintiff and therefore, the plaintiffs were estopped from making the present claim. Issues before the court were whether: (i) the insurance policy incontestable; (ii) there was a material non-disclosure by LHH to entitle the defendant to avoid the policy; (iii) the administrators of B LHH had the right to sue or whether they required sanction of the court; (iv) the acceptance by the first plaintiff of the refund of the premium estopped the plaintiffs from making the present claim; and (v) the sessions court was the proper court for recovery on a policy of insurance which amount was only RM100,000.

C

**Held**, allowing the plaintiffs' claim and dismissing the defendant's counterclaim:

(1) The relevant laws governing insurance matter at the time of LHH's death was the Insurance Act 1963 ('1963 Act'). Therefore, D the provisions of s 147(4) of the Insurance Act 1996 ('1996 Act') referred to by the plaintiffs were not applicable to the facts of the present case. However, both s 147(4) in the 1996 Act and s 15C(4) of the 1963 Act were in pari materia and had the same effect in respect of the issue of incontestability. The two-year period stated in s 15C(4) of the 1963 Act (as well as s 147(4) of E the 1996 Act) ran from the date on which the said policy was effected, namely, from the original date the policy was first issued and effected, in this case, 2 May 1990 and not from the date of the last reinstatement on 14 February 1993. Hence, the two-year period stipulated in s 15C(4) of the 1963 Act had expired and the defendant was precluded from contesting the validity of the policy F on the ground of false and non-disclosure of material facts unless fraud was alleged. There was no evidence of fraud adduced in the present case (see pp 439A–E, 440A–B, 441A–B); *Mithoolal v Life Insurance Corporation of India* 1962 AIR 814, *Leong Kum Whay & Anor v American International Assurance Ltd* [1999] 1 MLJ 24 and *Malaysian Assurance Alliance Bhd v Chong Nyuk Lan (administrator* G *of the estate of Liew Kin On, deceased)* [2002] 6 MLJ 648 followed.

(2) Although the incontestability clause in the insurance policy stipulated that the insurance policy shall be incontestable after it had been in force during the life time of the insured for a period of two years from the date of issue or reinstatement of this policy, H whichever was the later, the same did not affect the statutory incontestability provisions provided under s 15C(4) of the 1963 Act (which was applicable to the present case). LHH need not rely on the contractual incontestability clause as he was adequately protected by the statutory incontestability provisions under the 1963 Act. In any event, one cannot contract out of an Act of I Parliament, particularly since the relevant s 15C(4) was not worded so as to be 'subject to any contrary agreement or modification by the parties'. Therefore the defendant could not

have agreed with LHH to override s 15C(4) of the 1963 Act. Any such agreement would be void and unenforceable as being contrary to public policy. Section 15C(4) can only be defeated by proof of fraudulent suppression or omission of material facts. There was no suggestion in the pleadings or at trial of any fraudulent suppression of material facts (see pp 441C–442A); *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221 referred.

(3) It is trite that a party to a contract may sue to enforce his own contract. Therefore, the right for LHH to sue on this contract was very clear. If LHH had died, then the administrators of his estate may proceed to sue on behalf of the estate. The first plaintiff did not sue in her own name but was suing, together with the second plaintiff, as co-administrators of the estate of LHH. As administrators of the estate of LHH, there was no necessity for the plaintiffs to require leave or sanction of the court to bring the present suit. Leave was only applied for by the administrators if they wanted to be sure that they would be indemnified by the estate as to costs. Failure to obtain the leave or sanction would not invalidate the action (see pp 442D–E, 444A–C).

(4) The defendant had earlier applied at trial for this case to be transferred to the sessions court but that application was dismissed. The defendant did not appeal against the said ruling. In any event, in the present suit, the plaintiffs had claimed for specific performance whereas the defendant had counterclaimed for a declaratory relief. Both these reliefs were available only in the High Court. Further, the High Court was a court of unlimited jurisdiction. The fact that the RM100,000 suit was within the jurisdiction of the sessions court did not mean that the High Court had no jurisdiction to hear the matter. There was nothing to prevent the High Court from hearing a case involving a subject matter of RM100,000 (see p 444F–H).

(5) The burden was on the defendant to prove that LHH knew that he had 'hypertension/ischaemic heart disease' at the time he signed the relevant document. One cannot fail to disclose something that one is unaware of. There was no evidence to show that LHH ever knew he had 'ischaemic heart disease'. It was also unclear whether he got that disease (if at all) before or after 14 February 1993. In the premises, the allegations by the defendant were not proven (see p 446C–E).

(6) Furthermore, the documents were prepared by the insurer. The insured had no say in the wordings of the standard documents that he was asked to sign. Given those situation, if what was put down in writing was ambiguous, it was only right that the other party (the insured) be given the benefit of the doubt. Thus, if there was any ambiguity or doubt in the policy, it should be resolved in favour of the plaintiffs. The court was of the view that

A the defendant had failed to prove that LHH had failed to disclose any material fact relating to his health condition in the relevant documents to the policy; (see pp 446F–G, 447A); *Cheong Bee v China Insurance Co Ltd* [1974] 1 MLJ 203 followed.

(7) At the time of the purported refund of the premium by the B defendant, letters of administration of the estate of LHH had not been granted. Therefore, the first plaintiff's acceptance of the cheque was not made on behalf of LHH's estate and her action cannot in any way bind LHH's estate. In any event, the first plaintiff testified that she was told by the person that the payment was an advance payment involving her husband's death and the C balance would be paid later and the defendant failed to rebut those claims. Therefore, the first plaintiff's testimony stood unrebutted and thus must be accepted. Furthermore, the failure on part of the defendant to call the relevant witnesses attracted an adverse presumption under s 114(g) of the Evidence Act 1950 against the defendant (see p 447C–G).

D

**[Bahasa Malaysia summary**

Plaintif-plaintif adalah pentadbir-pentadbir harta pusaka Lim Hee Hiung ('LHH'). Semasa hayat beliau, LHH telah memasuki satu E kontrak insurans hayat dengan defendan. Di bawah terma-terma insurans hayat tersebut, defendan hendaklah membayar kepada isteri LHH ('plaintif pertama'), sebagai benefisiari, sejumlah RM100,000 apabila LHH meninggal dunia. Polisi tersebut telah dikeluarkan pertama kali pada 2 Mei 1990. Selepas itu, polisi tersebut telah dihidupkan semula sebanyak dua kali, pada 8 Mei 1991 dan F 14 Februari 1993. LHH telah meninggal dunia pada 28 Ogos 1993. Kedua-dua plaintif telah mendapatkan surat-surat pentadbiran ke atas harta pusaka LHH dan memulakan tuntutan mereka terhadap defendan. Defendan telah gagal dan enggan untuk membayar RM100,000 tersebut atas alasan bahawa LHH telah gagal untuk G mengemukakan kepada defendan keadaan kesihatan sebenar beliau dan telah sebaliknya menyatakan bahawa beliau adalah sihat walhal beliau sebenarnya menghidapi 'hypertensive/ischaemic heart disease'. Plaintif-plaintif telah memfailkan tindakan semasa untuk perlaksanaan spesifik polisi tersebut dan untuk defendan membayar jumlah RM100,000 beserta faedah kepada plaintif pertama sebagai H benefisiari yang dinamakan dalam polisi tersebut dan kos. Defendan telah memfailkan tuntutan balasnya untuk satu deklarasi bahawa polisi tersebut adalah terbatal dan tidak sah atas alasan bahawa LHH telah gagal untuk mendedahkan bahawa beliau menghidapi 'hypertensive/ischaemic heart disease'. Tambahan pula, defendan juga memohon untuk satu deklarasi bahawa jumlah RM2,368.21 I (iaitu premium yang telah dibayar oleh LHH untuk menghidupkan semula polisi tersebut) telah dibayar balik secara berkesan kepada plaintif dan oleh itu, plaintif-plaintif diestopkan daripada membuat

tuntutan semasa. Persoalan-persoalan di hadapan mahkamah adalah sama ada: (i) polisi insurans tersebut tidak boleh dicabar; (ii) terdapat satu ketakdedahan yang material oleh LHH untuk melayakkan defendan mengelakkan polisi tersebut; (iii) pentadbir-pentadbir LHH mempunyai hak untuk menyaman atau sama ada mereka dikehendaki mendapatkan kebenaran mahkamah; (iv) penerimaan oleh plaintif pertama terhadap bayaran balik premium mengestopkan oleh plaintif-plaintif daripada membuat tuntutan semasa; dan (v) mahkamah sesyen adalah mahkamah yang betul untuk menuntut suatu polisi insurans yang berjumlah hanya RM100,000.

**Diputuskan,** membenarkan tuntutan plaintif dan menolak tuntutan balas defendan:

(1) Undang-undang relevan yang mengawal perkara berhubung insurans pada masa kematian LHH adalah Akta Insurans 1963 ('Akta 1963'). Oleh itu, peruntukan-peruntukan s 147(4) Akta Insurans 1996 ('Akta 1996') yang dirujuk oleh plaintif-plaintif adalah tidak terpakai kepada fakta-fakta kes semasa. Namun begitu, kedua-dua s 147(4) dalam Akta 1996 dan s 15C(4) Akta 1963 adalah pari materia dan mempunyai kesan yang sama terhadap isu 'incontestability'. Tempoh dua tahun yang dinyatakan di dalam s 15C(4) Akta 1963 (dan begitu juga dengan s 147(4) Akta 1996) bermula daripada tarikh di mana polisi tersebut telah dikuatkuasakan, iaitu, daripada tarikh asal polisi tersebut pertama kali dikeluarkan dan dikuatkuasakan, dalam kes ini, 2 Mei 1990 dan bukan daripada tarikh penghidupan semula terakhir pada 14 Februari 1993. Justeru itu, tempoh dua tahun yang ditetapkan dalam s 15C(4) Akta 1963 telah luput dan defendan telah dihalang daripada mempertikaikan kesahan polisi tersebut atas alasan fakta-fakta material yang tidak benar dan tidak dikemukakan kecuali jika fraud dikatakan. Tidak terdapat sebarang keterangan fraud yang dinyatakan di dalam kes semasa (lihat ms 439A–E, 440A–B, 441A–B); *Mithoolal v Life Insurance Corporation of India* 1962 AIR 814, *Leong Kum Whay & Anor v American International Assurance Ltd* [1999] 1 MLJ 24 dan *Malaysian Assurance Alliance Bhd v Chong Nyuk Lan (administrator of the estate of Liew Kin On, deceased)* [2002] 6 MLJ 648 diikut.

(2) Walaupun klausa 'incontestabiliy' dalam polisi tersebut menetapkan bahawa polisi insurans tersebut hendaklah tidak boleh dipertikaikan selepas ia berkuatkuasa semasa hayat pengambil insurans tersebut untuk satu tempoh dua tahun daripada tarikh pengeluaran atau penghidupan semula polisi ini, yang mana terkemudian, yang sama tidak akan menjejaskan peruntukan 'incontestability' statutori yang diperuntukan di bawah s 15C(4) Akta 1963 (yang terpakai kepada kes semasa). LHH tidak perlu bergantung kepada klausa kontraktual 'incontestability' tersebut kerana beliau dilindungi secukupnya oleh peruntukan 'incontestability' statutori di bawah Akta 1963

tersebut. Dalam apa keadaanpun, seseorang tidak boleh membuat persetujuan untuk keluar dari satu Akta Parlimen secara kontrak, terutamanya jika s 15C(4) yang relevan tersebut tidak disusun dengan kata-kata seperti 'subject to any contrary agreement or modification by the parties'. Oleh itu, defendan tidak boleh bersetuju dengan LHH untuk menolak s 15C(4) Akta 1963. Perjanjian sedemikian adalah terbatal dan tidak berkuatkuasa kerana bertentangan dengan polisi awam. Seksyen 15C(4) hanya boleh diatasi dengan bukti tindakan menyekat secara fraud atau peninggalan fakta-fakta material. Tiada cadangan dalam pliding atau di perbicaraan tentang apa-apa tindakan menyekat secara fraud fakta-fakta material tersebut (lihat ms 441C–442A); *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221 dirujuk.

(3) Ia adalah tetap bahawa satu pihak kepada satu kontrak boleh menyaman untuk menguatkuasakan kontrak beliau sendiri. Oleh itu, hak untuk LHH menyaman berdasarkan kontrak ini adalah jelas. Jika LHH meninggal dunia, maka pentadbir-pentadbir harta pusaka beliau boleh terus menyaman bagi pihak harta pusaka tersebut. Plaintif pertama tidak menyaman dalam nama beliau sendiri tetapi menyaman bersama dengan plaintif kedua, sebagai pentadbir bersama harta pusaka LHH. Sebagai pentadbir-pentadbir harta pusaka LHH, tiada keperluan untuk plaintif-plaintif memohon kebenaran mahkamah untuk memulakan guaman semasa. Kebenaran hanya dipohon oleh pentadbir-pentadbir tersebut jika mereka ingin kepastian bahawa mereka akan dibayar balik oleh harta pusaka tersebut bagi kos tindakan. Kegagalan untuk memperoleh kebenaran tidak akan menjadikan tindakan tersebut tidak sah (lihat ms 442D–E, 444A–C).

(4) Defendan telah terlebih dahulu memohon untuk kes ini dipindahkan ke mahkamah sesyen tetapi permohonan tersebut telah ditolak. Defendan tidak membuat rayuan terhadap keputusan tersebut. Bagaimanapun, dalam guaman semasa, plaintif-plaintif telah menuntut perlaksanaan spesifik manakala defendan telah membuat tuntutan balas untuk satu relif deklarasi. Kedua-dua relif tersebut hanya terdapat di Mahkamah Tinggi. Tambahan pula, Mahkamah Tinggi adalah satu mahkamah yang mempunyai bidang kuasa yang tidak terhad. Hakikat bahawa guaman RM100,000 adalah dalam bidang kuasa mahkamah sesyen tidak bermakna bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mendengar perkara tersebut. Tiada apa yang boleh menghalang Mahkamah Tinggi daripada mendengar suatu kes yang melibatkan satu perkara pokok berjumlah RM100,000 (lihat ms 444F–H).]

(5) Beban adalah atas defendan untuk membuktikan bahawa LHH mengetahui bahawa beliau mempunyai 'hypertension/ischaemic heart disease' pada masa beliau menandatangani dokumen yang relevan. Seseorang tidak boleh gagal untuk mendedahkan sesuatu

yang tidak diketahui oleh seseorang itu. Tiada keterangan untuk menunjukkan bahawa LHH pernah mengetahui beliau mempunyai 'hypertension/ischaemic heart disease'. Ia juga tidak jelas sama ada beliau mendapat penyakit tersebut (jika ada sekalipun) sebelum atau selepas 14 Februari 1993. Dalam premis sedemikian, pengataan-pengataan oleh defendan tidak dibuktikan (lihat ms 446C–E).

(6) Tambahan pula, dokumen-dokumen tersebut telah disediakan oleh penanggung insurans. Pengambil insurans tidak mempunyai hak untuk berkata apa-apa tentang susunan kata dokumen-dokumen piawai tersebut yang beliau diminta untuk tandatangan. Dalam keadaan sedemikian, jika apa yang ditulis adalah tidak nyata, ia hanya patut pihak satu lagi (pengambil insurans) diberikan kepercayaan walaupun berasa sangsi. Oleh itu, jika terdapat keraguan dalam polisi tersebut, ia sepatutnya diselesaikan dengan berpihak kepada plaintif-plaintif. Mahkamah berpandangan bahawa defendan telah gagal untuk membuktikan bahawa LHH telah gagal untuk mendedahkan apa-apa fakta material berkaitan dengan keadaan kesihatan beliau dalam dokumen-dokumen yang relevan kepada polisi tersebut (lihat ms 446F–G, 447A); *Cheong Bee v China Insurance Co Ltd* [1974] 1 MLJ 203 diikut.

(7) Pada masa bayaran balik premium oleh defendan, surat-surat pentadbiran harta pusaka LHH belum lagi diberikan. Oleh itu, penerimaan cek oleh plaintif pertama tidak dibuat bagi pihak harta pusaka LHH dan tindakan beliau tidak boleh dalam apa cara mengikat harta pusaka LHH. Dalam apa keadaan, plaintif pertama telah memberi keterangan bahawa beliau telah diberitahu oleh orang tersebut bahawa bayaran tersebut adalah bayaran pendahuluan yang melibatkan kematian suami beliau dan bakinya akan dibayar kemudian dan defendan telah gagal untuk mematahkan keterangan tersebut. Oleh itu, testimoni plaintif pertama masih tidak dipatahkan dan dengan itu harus diterima. Tambahan pula, kegagalan di pihak defendan untuk memanggil saksi-saksi yang relevan telah mewujudkan satu andaian yang bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadap defendan (lihat ms 447C–G).]

## Notes

For cases on jurisdiction of High Court in civil procedure, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3724–3775.

For cases on duty of disclosure, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 140–141.

For cases on formation of contract and commencement of cover, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 142–143.

For cases on capacity to sue, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1735–1738.

A **Cases referred to**

*Cheong Bee v China Insurance Co Ltd* [1974] 1 MLJ 203 (refd)
*Emar Sdn Bhd (under receivership) v Aidigi Sdn Bhd and another appeal* [1992] 2 MLJ 734 (refd)
*Bank Bumiputra Malaysia Bhd v Mohamed bin Salleh* [2000] 2 MLJ 412 (refd)
B
*Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221 (folld)
*LEC Contractors (M) Sdn Bhd (formerly known as Lotterworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor* [2000] 3 MLJ 339 (refd)
C *Leong Kum Whay & Anor v American International Assurance Ltd* [1999] 1 MLJ 24 (folld)
*Malaysian Assurance Alliance Bhd v Chong Nyuk Lan (administrator of the estate of Liew Kin On, deceased)* [2002] 6 MLJ 648 (folld)
*Malaysian Australian Finance Co Ltd v The Law Union and Rock Insurance Co Ltd* [1972] 2 MLJ 10 (refd)
D *Mithoolal v Life Insurance Corporation of India* 1962 AIR 814 (folld)
*Pacific & Orient Insurance Co Sdn Bhd v R Karthivelu* [1992] 1 MLJ 249 (refd)
*State Government of Perak v Muniandy* [1986] 1 MLJ 490 (refd)

E **Legislation referred to**

Civil Law Act 1956 s 23
Evidence Act 1950 s 114(g)
Insurance Act 1963 s 15C(4)
Insurance Act 1996 s 147(4)
F Insurance Act 1938 [India] s 45

*Francis JL Tan* (*Rosni Francis Tan & Ho*) for the plaintiffs.
*Dato Bastian Pius Vendorgon* (*Vendorgon & Partners*) for the defendant.

**Ramly Ali J**: The plaintiffs are administrators of the estate of Lim Hee
G Hiung ('LHH'). During his lifetime, ie on 30 April 1990, LHH entered into a contract of insurance with the defendant. It is a life insurance policy wherein the defendant was to pay LHH's named beneficiary the sum of RM100,000 upon LHH's death. LHH named his wife Tan Guat Lan ('the first plaintiff') as his beneficiary in that policy. The said policy was first issued on 2 May 1990. After that the policy was reinstated twice, ie on
H 8 May 1991 and 14 February 1993. On both occasions, LHH has signed a 'Declaration of Good Health'. LHH died on 28 August 1993 (ie within one year period from the date of the second reinstatement on 14 February 1993). Both the plaintiffs took out letters of administration of LHH's estate and proceeded with their claim against the defendant. The defendant failed and refused to pay the RM100,000, as demanded by the plaintiffs on the
I ground that LHH has failed to disclose to the defendant on 14 February 1993 (when he signed the 'Declaration of Good Health' for the second reinstatement of the policy), his real state of health and had declared that he

was healthy whereas he was suffering from 'hypertensive/ischaemic heart disease'. A

The plaintiffs filed the present action for specific performance of the policy and for the defendant to pay a sum of RM100,000 together with interest to the said Tan Guat Lan (the named beneficiary in the policy) and costs. B

On the other hand, the defendant filed its counterclaim for a declaration that the said policy was null and void on the ground that LHH has failed to disclose that he was suffering from 'hypertensive/ischaemic heart disease' in the relevant form for reinstatement on 14 February 1993. The defendant also prayed for a declaration that the sum RM2,368.21 (being premium paid by LHH for the reinstatement of the policy) was C effectively refunded to the said Tan Guat Lan.

There are various issues raised during the trial by both parties, namely:

(i) is the insurance policy in the present case, incontestable?;

(ii) whether a policy of insurance, is vitiated if there is a material non-disclosure of a fact, and therefore does LHH's non-disclosure of the D fact that he suffered from hypertensive/ischoemic heart disease, a material non-disclosure and entitle the defendant to avoid the policy?;

(iii) do the plaintiffs, as representatives of the estate of LHH (deceased) have the right to sue in the present case or whether the plaintiffs require sanction of the court; E

(iv) does the acceptance by the first plaintiff the refund of premium pursuant to the avoidance of the policy for material non-disclosure as aforesaid result in the plaintiffs being estopped from making this claim?; and

(v) is this a fit and proper case for recovery on a policy of insurance in the F sessions court as the amount claimed is only RM100,000?

I shall now deal with the issues raised.

*Issue of incontestability*

G

The plaintiffs argued that the said policy is incontestable on the ground of a non-disclosure of material fact in the proposal form under s 147(4) of the Insurance Act 1996 ('the 1996 Act'), after the expiry of two years period from the date of the policy when it was first issued on 2 May 1990. The defendant, on the other hand, relying on the 'Incontestability and Suicide Provisions' in the policy itself claimed the two years period for H incontestability should run 'from the date of issue or reinstatement of the policy whichever is later.' In other words, the defendant is saying that since the last reinstatement of the policy was made on 14 February 1993 and LHH's death on 28 August 1993, the two years period to invoke the incontestability provisions should start from the date of the last reinstatement (14 February 1993), not the date when the policy was first I issued on 2 May 1990. The defendant also argued that s 147(4) of the 1996 Act is not applicable to the present case because the said 1996 Act only

A came into force on 1 January 1997 whereas the insured (LHH) died on 28 August 1993. The defendant further argued that the insurance law on that date was governed by the Insurance Act 1963 ('the 1963 Act') which has been repealed by the 1996 Act.

The court agrees with the defendant that the relevant laws governing
B insurance matter at the time of LHH's death was the 1963 Act. The 1996 Act only came into force on 1 January 1997, and it does not provide for retrospective application. Therefore the provisions of s 147(4) of the 1996 Act as quoted by the plaintiffs, are not applicable to the facts of the present case. However, that is not the end of the matter as far as this issue is concerned. The court has to see what were the relevant provisions in the
C 1963 Act which may have the same effect as s 147(4) of the 1996 Act.

Prior to the 1996 Act, there was the 1963 Act, but even that legislation was amended initially with s 15C(4) wherein the contestability refers to the time which the policy was issued or reinstated by the insurer and the period was for three years. That was subsequently re-amended and to take effect
D from 1 April 1978 wherein the earlier reference to time of issuance was deleted and replace with the phrase 'the time the policy was affected'. And that was maintained by the 1996 Act in s 147(4). Having perused both the present s 147(4) in the 1996 Act and s 15C(4) of the 1963 Act, I am convinced that both the sections are in pari materia and having the same effect on the issue in question — relating to when the two years period
E should start.

Section 15C(4) of the 1963 Act reads:

> No life policy effected before the commencement of this section shall, after the expiry of two years from such commencement, and no life policy effected after the commencement of this section shall, after the expiry of two years from the
F date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in a report of a doctor, referee, or any person, or in a document leading to the issue of the policy, was inaccurate or false unless the insurer shows that such statement was on a material matter or suppressed a material fact and that it was fraudulently made by the policy holder with the knowledge that the statement
G was false or that it suppressed a material fact.

The two years period under s 15C(4) of the 1963 Act should run from the date on which the said policy was affected. The question is: when is a policy said to be affected? In the case of reinstatement of the policy as in the present case, when is the policy said to be affected? Is it from the time of the
H original issuance of the policy on 2 May 1990, or at the time it was last reinstated on 14 February 1993. If it starts from the time of the original issuance of the policy on 2 May 1990, then the two years period clearly had lapsed when LHH died on 28 August 1993 and s 15C(4) is applicable, ie the policy is incontestable unless the defendant as an insurer shows that the alleged non-disclosure relates to material facts and it was fraudulently made
I by LHH as the insured. If, on the other hand, the two years year period starts from the date when the policy was last reinstated on 14 February 1993 then the two years period had not lapsed when LHH died on 28 August

1993, therefore, the incontestability provisions under s 15C(4) of the 1963 Act is not applicable and the policy may be contested by the defendant on the ground of non-disclosure, without having to prove any element of fraud.

Having perused all the materials before me and having considered the respective contentions by both parties as well as all the relevant authorities cited, I am of the view that the computation of the two years period as stipulate in s 15C(4) of the 1963 Act (as well as s 147(4) of the 1996 Act) should start from the original date the policy was first issued and affected, ie 2 May 1990 in the present case, and not from the date of the last reinstatement on 14 February 1993. The decision of the Indian Supreme Court in *Mithoolal v Life Insurance Corporation of India* AIR 1962 SC 814 and the decision of our High Court in *Leong Kum Whay & Anor v American International Assurance Ltd* [1999] 1 MLJ 24 and *Malaysian Assurance Alliance Bhd v Chong Nyuk Lan (Administrator of the Estate of Liew Kin On, deceased)* [2002] 6 MLJ 648, clearly support my view.

In the case of *Mithoolal*, the Indian Supreme Court was considering s 45 of the Indian Insurance Act 1938 (which is in pari materia with s 15C(4) of our 1963 Act) and stated:

> Whether the revival of a lapsed policy a new contract or not for other purposes, it is clear from the wording of the operative part of s 45 that the period of two years for the purpose of the section has to be calculated from the date on which the policy was originally effected ...

Similarly in the case of *Leong Kum Whay* it was held by Mohd Noor Ahmad J (as he then was) that for the first insurance policy the computation of the two years period for the purpose of the re-amended s 15C(4) of the 1963 Act should be from the original date it was first effected

His Lordship held there at p 28 that:

> The first policy was effected on 9 August 1989 and the accident happened on 26 June 1993, that is to say, the two-year requirement under the section had expired. Hence, it is caught by the section. Under the section, the first policy cannot be called in question by the defendant on the ground that the statement made in the proposal for insurance was inaccurate or false unless the defendant shows that such statement was on a material matter or suppressed a material fact and that it was fraudulently made by the first plaintiff with the knowledge that the statement was false or that it suppressed a material fact. To my mind the defendant failed to prove the required ingredients as I have stated in para 4 above, the first policy is valid and therefore, the defendant cannot avoid its liabilities under it.

Very recently, in the case of *Chong Nyuk Lan,* Richard Malanjum J (as he then was), in interpreting s 147(4) of the 1996 Act (which is in pari materia with s 15C(4) of the 1963 Act in relation to the two years period) has followed the earlier decisions and stated:

> Having given serious consideration to the opposing contentions of learned counsel for the parties, I am inclined to accept the position of the law as regards s 147(4) of the Act as interpreted in *Mithoolal* and that is to say that the computation of the two years period should start from the time the policy was originally effected regardless of lapse or renewal of the said policy.

In the present case, the policy was first affected on 2 May 1990 and LHH died on 28 August 1993 and the claim was filed after that date. The two years period has definitely expired and the defendant should be precluded from contesting the validity of the policy on the ground of false and non-disclosure of material facts unless fraud is alleged. There is no evidence of fraud adduced in the present case. Therefore, the defendant is not entitled to have the benefit of the second limb of the said s 15C(4).

For the foregoing reason alone, the plaintiffs' claim should be allowed with costs.

The defendant is saying that the two years period as provided under cl 1 of the general provisions of the said policy, should start from the date of the last reinstatement, ie 14 February 1993. The incontestability clause under cl 1 provides:

> Incontestability: This policy (excluding all supplementary rider contracts attached to the Policy) shall be incontestable except for non-payment of premium, after it had been in force during the life time of the Insured for a period of two years from the date of issue or reinstatement of this policy, which ever is later.

The defendant also relied on the 'Declaration of Good Health' (D6 and D7) submitted by the LHH for the purpose of reinstatement of the policy which say:

> I further agree that if the policy be reinstated or issued the Incontestability and Suicide Provisions thereof shall be deemed and held and so modified as to have effect from the date of this certificate instead of the original issue date of the policy.

These contractual incontestability provisions do not contain the proviso or exception as provided under s 15C(4) of the 1963 Act. However, it contained a part stating that the period of two years will run from the date of reinstatement of the policy (if there is a reinstatement).

The words used in those documents as well as the policy, clearly show that it affects only the contractual incontestability provisions. It does not affect the statutory incontestability provisions provided under s 15C(4) of the 1963 Act (which was applicable to the present case). Section 15C(4) or any other relevant provisions of the Insurance Act was not even mentioned in the said documents. The insured need not rely on the contractual incontestability provisions as he is adequately protected by the statutory incontestability provisions under the Act. In any event, one cannot contract out of an Act of Parliament. The relevant s 15C(4) was not worded so as to be 'subject to any contrary agreement or modification by the parties.' Therefore the defendant cannot agree with the insured (LHH) to override s 15C(4). Any such agreement would be void and unenforceable as being contrary to public policy. In the case of *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221, Edgar Joseph Jr J (as he then was) held the following:

> In any event, any attempt to contract out of clear statutory provisions would be void and wholly ineffective as being contrary to public policy. Condition 12 must be read in the same light.

Section 15C(4) can only be defeated by proof of fraudulent suppression or omission of material facts. There is no suggestion in the pleadings or at trial of any fraudulent suppression of material facts. Fraud must be specifically pleaded and proved (see *LEC Contractors (M) Sdn Bhd (formerly known as Lotterworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor* [2000] 3 MLJ 339 at p 359).

*Right to sue*

The learned counsel for the defendant contended that from the documents tendered, the beneficiary under the policy is Tan Guat Lan (the first plaintiff); and as such the proceeds (if were to be paid) are payable to the first plaintiff pursuant to s 23 of the Civil Law Act 1956 and therefore the action ought to have been commenced by the first plaintiff as a beneficiary, and not by the administrators. Further, the learned counsel for the defendant also contended that as the action is commenced by the administrators (personal representatives) of the estate of LHH (deceased) leave of court is necessary to ascertain the burden of costs. In the present case, the learned counsel submitted that the plaintiffs neither produced the consent of the first plaintiff (as a beneficiary) nor leave of the court to commence this action.

It is trite that a party to a contract may sue to enforce his own contract. That is beyond doubt. Therefore, the right of LHH to sue on this contract of insurance is very clear. If Tan Guat Lan (the first plaintiff) had sued in her own name (as a beneficiary) to recover the RM100,000, the issue would have been less clear as the absence of privity of contract and lack of consideration by her would plague her case. However, this issue does not concern us now as Tan Guat Lan does not sue in her own name here. She sues together with Tan Guat Hong as co-administrators of the estate of LHH.

The following cases would be able to show why the present action was brought by LHH's administrators and the problem that would have arisen had Tan Guat Lan chosen to sue in her own right as a beneficiary.

First, in the case of *Emar Sdn Bhd (under receivership) v Aidigi Sdn Bhd and another appeal* [1992] 2 MLJ 734, Edgar Joseph Jr J stated in his judgment the following at p 752:

> Seventy-seven yeas ago, Viscount Haldane LC speaking for the House of Lords in the celebrated case of *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* ([1915] AC 847) said this at p 853:
>
> > 'My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam.'

In the case of *Malaysian Australian Finance Co Ltd v The Law Union and Rock Insurance Co Ltd* [1972] 2 MLJ 10, Azmi J (as he then was) held the following at p 12:

A Even if the applicant is a stranger to the contract of insurance and therefore cannot ordinarily sue on the basis of it, this general rule of law is not absolute and is subject to some exceptions which are definite and recognized. One of these exceptions is where there is a direct agreement to pay to or the respondent constitutes itself as the agent of the third party. This particular exception is illustrated at p 282 of Sanjiva Row's *Commentaries on Indian* B *Contract Act and Law Relating to Tenders* (6th Ed) Vol 1, where the writer said:

> 'Yet another exception to the general rule is afforded where the promisor, between whom and the stranger no privity exists, creates privity by his personally agreeing with the stranger to pay him direct or becomes estopped from denying his liability to pay him personally.'

C The other exception is where a trust is created which is illustrated by Sanjiva Row at p 278 as follows:

> 'A third party who is to be benefited under a contract between A and B acquires equitable rights ex contractu if the agreement between the parties is so framed as to make one of them a trustee for the third party. In *Gandy v Gandy* (1885) 30 Ch D 57 at 67, Cotton LJ put the mater D thus; 'If the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial interest as cestui que trust under that contract; then B would, in a Court of Equity, be allowed to insist upon and enforce the contract.'

In the present case, because of the fact that the respondent has taken upon itself in the relevant endorsement to pay the applicant direct in respect of E money arising to be paid under the policy, and the fact that the insurance policy was in fact effected for the applicant's benefit, the respondent should be regarded as trustee and/or agent for the applicant ... .

Under the circumstances, it is my finding that the applicant has rights co-extensive as the said insured Choong Kok Hin in instituting claims in its own name against the respondent arising out of loss of the subject matter, upon F which coverage was provided by the respondent by virtue of the endorsement dated 29 June 1968 appearing in the insurance policy.

Thus from the above two authorities, the law appears to be that where A contracts with B to pay C on the happening of an event, the general rule is that only A may sue and C who is not a party to the contract may not sue G on the contract; but if there is an agreement that B should pay direct to C or a trust has been created for C, then C may sue to enforce the contract and in such event, the right to sue between A and C are 'co-extensive'. A 'co-extensive' right is one which may be exercised by either party ie both LHH and Tan Guat Lan (in the present case) may sue. Furthermore, in the case of *Bank Bumiputra Malaysia Bhd v Mohamed bin Salleh* [2000] 2 MLJ H 412, in the judgment of Lush LJ in *Lloyd's v Harper* (1880) 16 Ch D 290 at p 321, the Court of Appeal held that (at p 415):

> [W]here a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself.

I Thus, LHH's right to sue the defendant is absolute as LHH is a party to the contract of insurance whereas Tan Guat Lan's right to sue would be available only if certain condition precedents are present. Needless to say,

it is desirable that LHH sues instead of Tan Guat Lan. If LHH had died, then the administrators of his estate may proceed to sue on behalf of the estate. In practice, Tan Guat Lan would only sue in her own name (as a beneficiary) if LHH's administrators refused or neglected to sue on her behalf to recover the money.

*Leave/sanction to bring proceedings*

The defendant submitted that the plaintiffs, as administrators of the estate of LHH require leave or sanction of the court to bring the present suit. With respect, I cannot agree with this argument. In law, leave or sanction of court is not a sine quo non for the filing of the present action. Leave is only applied for by the administrators if they wish to be sure that they will be indemnified by the estate as to costs. Failure to obtain the leave or sanction obviously will not invalidate the action. In *Halsbury's Laws of England*, (4th Ed) Vol 17 at p 793, para 1560, it is stated that:

> It is advisable for a personal representative before bringing or defending an action to obtain the consent of all the beneficiaries on whom the burden of costs would ultimately fall or, if for any reason this is not forthcoming, to seek the court's directions by originating summons. If the beneficiaries' consent or the court's sanction is not thus obtained, the personal representative litigates at his own risk as to costs in the sense that he maybe deprived of his right to be indemnified out of the estate if the court considers that he acted unreasonably in prosecuting or defending the action.

*Sessions court or High Court*

The defendant also argued that the present suit ought to be brought in the sessions court, not in the High Court as the value of the plaintiffs' claim is only RM100,000.

Looking at the notes of proceedings, I noticed that the defendant had earlier applied at trial (before his Lordship Mohd Hishamuddin J) for this case to be transferred to the sessions court. That application was dismissed by his Lordship. There is no appeal made by the defendant against the said ruling. Therefore, this issue is settled and need not be considered again at this stage of the proceedings.

In any event, in the present suit, the plaintiffs had claimed for specific performance whereas the defendant had counterclaimed for a declatory relief. Both these reliefs are available only in the High Court. Further, the High Court is a court of unlimited jurisdiction. Just because a RM100,000 suit is within the jurisdiction of the sessions court, it does not mean that the High Court has no jurisdiction to hear it. There is nothing to prevent the High Court from hearing a case involving a subject matter of RM100,000. This case has been heard in full by the High Court, therefore there is no question of transferring it to the sessions court.

*Non-disclosure by the insured*

The defendant's substantive defence appears to be limited to para 4.3 of the statement of defence. It basically says that LHH as insured had failed to

A disclose to the defendant on 14 February 1993 his real state of health and had declared that he was healthy whereas he was suffering from 'hypertensive/ischaemic heart disease'. At trial, the defendant appeared to also alleged as part of their arguments that LHH had failed to disclose his hypertensive condition in the proposal form (exh D5), in particular, that LHH had not ticked the column 'Yes' in question 20(b) of the proposal B form.

Exhibit D5 (Policy Information Form) is the defendant's standard form. Part 11 of the form clearly shows that the question to be answered in the form will depend on whether it is a 'medical case' or a 'non-medical case'. According to the form, for 'medical case', questions 18 to 25 need not be C answered. Exhibit D5 does not state whether the case involving LHH was a medical case or not. No evidence was led by the defendant to explain why the relevant boxes in Part 11 were not ticked. There was also no evidence emanating from the defendant at trial that can show that this case was a 'non-medical case'. In fact, there is no evidence to show what is the difference between a 'medical case' and a 'non-medical case'. In fact, the defendant's D insurance agent named in exh D5 was not even called to give evidence at all. What did she tell LHH? Did she propose to LHH a 'medical case' or a 'non-medical case'? LHH is dead. The said insurance agent should have been called by the defendant to explain this. The plaintiff had given ample notice of this issue to the defendant (see plaintiffs' reply and defence to E counterclaim, para 2.4 on p 14 of the bundle of pleadings). In the circumstances, I am of the view that the rule of 'contra proferentum' is applicable and Part 11 of the proposal as in exh D5 should be construed against the defendant (see *Pacific & Orient Insurance Co Sdn Bhd v R Karthivelu*[1992] 1 MLJ 249). That being the case, the case in the proposal should be construed as a 'medical case' and as such questions 18 to 25 are F redundant and need not be answered by LHH. Therefore, there can be no non-disclosure to a question which need not be answered in the first place. The matters covered by questions 18 to 25 are not to be considered as material. Therefore there is no question of non-disclosure of material facts. The 'Declaration of Good Health' dated 14 February 1993 made by LHH for the purpose of the last reinstatement of the policy clearly shows that LHH G was not making a fresh declaration that he was healthy, but had declared that he was in 'as good health as when he signed' the earlier proposal form (exh D5) and that his health 'had not changed'. Therefore, for the purpose of determining the issue of non-disclosure as alleged by the defendant, it must relate to the status of the earlier proposal form (as in exh D5).

H The burden to prove non-disclosure by LHH lies with the defendant. The defendant need to prove that LHH had hypertension at the time he signed the proposal from (exh D5) on 30 April 1990. In this respect, the evidence of Dr A Rajadurai of Reddy Clinic (DW1) is not relevant at all as the clinic first saw LHH on 17 March 1993, ie after the proposal form (exh D5) was signed. In fact, it is even after the date of the last declaration I of health (exh D7) was signed on 14 February 1993. The evidence of Dr Charban Singh (DW2) is inconclusive when he said (at p 37 of the notes of proceedings):

> I've seen him 3–4 times a year. At other time, he must have been seen by the doctors. To assess the medical condition, would have to do further assessment and test on him, which I am afraid was not done, because the patient was not very keen.

The said witness (DW2) also said at p 39 of the notes of proceeding that:

> Stress, exercise and lack of sleep may cause high blood pressure also. White-coat high blood pressure, should not elevate high blood pressure.

'White-coat high blood pressure' according to DW2 describes the phenomenon where, for some people, their blood pressure goes high every time it is measured by a doctor (thus, the phrase 'white coat'). If the blood pressure is measured by some one else, the pressure falls back. This is a phenomenon recognized by the medical circle.

Furthermore, the defendant's pleadings talked about 'hypertension/ischaemic heart diseases'. The burden is on the defendant to prove that LHH knew that he had 'hypertension/ischaemic heart disease' at the time he signed the relevant document. One cannot fail to disclose something that one is unaware of. There is no evidence to show that LHH ever knew he had 'ischaemic heart disease'. It is also unclear whether he get that disease (if at all) before or after 14 February 1993. Both the medical doctors who gave evidence (DW1 and DW2) did not mention any 'ischaemic heart disease' nor was there any attempt to explain what 'ischaemic heart disease' is, let alone linking 'hypertension' to 'ischaemic heart disease'. In the premises, the allegations in the defendant's pleadings are not proven. Parties are bound by their pleadings (see *State Government of Perak v Muniandy* [1986] 1 MLJ 490).

The insurance companies have massive resources including lawyers to advise them and help them draft documents and the burden ought to be placed on them, to ensure that there can be no ambiguity or doubt in the documents. It is common knowledge that the ordinary person who applies for a policy or a reinstatement of a policy has no say in the wordings of the standard documents that he is asked to sign. These documents are prepared by the insurers and only they decide what words to use and what conditions to be put down in writing. Therefore, given those situations if what was put down in writing is ambiguous, it is only right that the other party (the insured) be given the benefit of the doubt. Thus in the present case, if there is a doubt or ambiguity in the policy or in the Declaration of Health Form, it should be resolved in favour of the plaintiffs. In the case of *Cheong Bee v China Insurance Co Ltd* [1974] 1 MLJ 203, the late Hashim Yeop Sani J (as he then was) stated the following at p 204:

> I am mindful of *Tan Kwang Chin v Public Prosecutor* [1959] MLJ 253 where the learned judge referred to the judgment in *Edwards v Griffiths* [1953] 1 WLR 1199, 1203 wherein it is stated that 'if there is an ambiguity or a doubt as to the extent of the Policy, we should have to construe it in favour of the assured, that is to say, if the question arose as to the liability of the insurers, we should have to put on the Policy the construction most favourable to the assured and the less favourable construction to the insurers.

A In the premise, the court is of the view that the defendant has failed to prove that LHH has failed to disclose any material fact relating to his health condition in the relevant documents to the policy.

*Refund of premium*

B The defendant alleged that an amount of RM2368.21 as premium paid by LHH on reinstatement of the policy on 14 February 1993 was refunded and accepted by the first plaintiff pursuant to the avoidance of the policy for material non-disclosure as aforesaid, and therefore the plaintiffs are estopped from making the present claim.

C The evidence show that sometime in July or August 1996, an Indian gentleman approached the first plaintiff and gave her a cheque for the sum of RM2368.21. At that time letters of administration of the estate of LHH had not been granted. Letters of administration was granted to both the plaintiffs on 10 September 1998. Therefore, the first plaintiff accepted the D cheque not on behalf of LHH's estate. Her action cannot in any way bind LHH's estate. In any event, the first plaintiff gave evidence that she was told by the Indian gentleman that the payment was an advance payment involving her husband's death and the balance will be paid later (see pp 7–9 of the notes of proceedings). She was not told that the payment was a refund for the premium paid. She also said that she did not spend the E said money and after consulting a lawyer, she had returned the money to the defendant but the defendant had refused to accept it. The witness for the defendant (DW4) told the court that she did not witness the incident when the Indian gentleman handed the cheque to the first plaintiff and the said cheque was delivered to the first plaintiff by City Adjusters and Investigators Sdn Bhd through their staff named Sivamorthy. In view of the claims made F by the first plaintiff, if the defendant intended to deny those claims, they should have called a representative from City Adjusters and Investigators Sdn Bhd or Mr Sivamorthy himself to rebut those claims. They did not. Therefore, the first plaintiff's testimony stands unrebutted and thus must be accepted. Furthermore, the failure on part of the defendant to call the said G witnesses attracts on adverse presumption under s 114(g) of the Evidence Act 1950 against the defendant.

In any event, as has been concluded earlier that the defendant is not entitled to contest or to avoid the said policy under s 15C(4) of the 1963 Act (which was in force at the relevant times) the question of the defendant H refunding the said premium on the ground of material non-disclosure does not arise.

*Findings on the plaintiffs' claim*

On the above considerations, I am of the opinion that the plaintiffs have, on I the balance of probabilities, proved their claim against the defendant. It is therefore my judgment that the plaintiffs claim be allowed with costs and order as prayed in the statement of claim is hereby granted.

*The defendant's counterclaim*

The defendant's counterclaim is grounded on the same premise as that of the statement of defence ie that the said policy was invalid for non-disclosure of material fact when the said policy was reinstated on 14 February 1993 as stated in para 2 of the counterclaim. Therefore, the defendant's counterclaim in this case is redundant. It is merely a defence to the plaintiff's claim In any event, by reason of the above, the counterclaim ought to be sdismissed with costs.

*Plaintiffs' claim allowed and defendant's counterclaim dismissed.*

Reported by Lim Lee Na